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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-215991 **DATE:** November 30, 1984
MATTER OF: Uffner Textile Corp.

DIGEST:

Protest that agency improperly refused to reject low bid as nonresponsive for failure to acknowledge an amendment is denied where the solicitation, through the incorporation by reference of various standard military specifications, already included provisions setting forth the same requirements as set forth in the amendment. An amendment which merely clarifies an existing solicitation requirement is not material and, accordingly, a bidder's failure to acknowledge such an amendment is waivable as a minor informality.

Uffner Textile Corp. (Uffner) protests the award of any contract to Hialeah Industries, Inc. (Hialeah), under invitation for bids No. DLA100-84B-0746, issued by the Defense Personnel Support Center, Defense Logistics Agency (DLA), for camouflage wet weather poncho liners. Uffner alleges that Hialeah's failure to acknowledge an amendment to the solicitation rendered its apparent low bid non-responsive. We deny the protest.

As issued, the solicitation required that the liners conform to MIL-L-43335D, "MILITARY SPECIFICATION: LINER, WET WEATHER PONCHO" (November 30, 1982). Paragraph 3.2.1 of that specification provides that:

"[t]he quilted polyester batting shall conform to type I, class 4, style a of MIL-B-41826 except that the outer covering for batting intended for liners made according to figure 1 may be full width, or may be joined with a single seam (before quilting) as specified in 3.2.1.1 to achieve the full

030682

width or length required for liners. The bonded batting intended for liners made according to figure 1 shall be full width and length and butting or lapping is not permitted in either direction."

By amendment No. 1, the Agency amended paragraph 3.2.1 of MIL-L-43335D to add after the phrase "required for liners" the following:

"and the outer covering cloth shall have the following infrared reflectance values: Yellow Green 354-52% minimum; Dark Green 355-32 + 4%; Brown 356- 22 + 4%; Black 357-10% Maximum."

DLA received 13 bids in response to the solicitation. Although Hialeah submitted the apparent low bid, it failed to acknowledge receipt of amendment No. 1. Nevertheless, DLA found Hialeah's bid to be responsive, concluding that Hialeah's failure to acknowledge the amendment could be waived as a minor informality because the requirements in the amendment concerning the infrared reflectance values of the outer covering cloth were already incorporated by reference into the solicitation.

In this regard, DLA has noted that paragraph 3.2.1 of military specification MIL-L-43335D provides that the batting should conform to the requirements of type I, class 4, of military specification MIL-B-41826, "BATTING, SYNTHETIC FIBERS: POLYESTER, (QUILTED AND UNQUILTED)." Paragraphs 1.2 and 2.1 of the current version of that specification, MIL-B-41826E (June 27, 1979), in turn, require for class 4 the use of rip stop nylon cloth, 4-color U.S. Army Pattern 1948, conforming to military specification MIL-C-43637, "CLOTH, PLAIN WEAVE, RIPSTOP, NYLON; FOR LINERS." Paragraphs 1.2, 3.3.3 and 3.8.1 of the current version of that specification, MIL-C-43637B (December 29, 1983), require that U.S. Army Pattern 1948 cloth provide the same infrared reflectance levels specified in amendment No. 1.

In response to DLA's refusal to reject Hialeah's bid as nonresponsive, Uffner filed this protest with our

Office. Uffner maintains that it is not for the contracting officer to consider the impact of the unacknowledged amendment and that a bidder's failure to acknowledge an amendment renders its bid nonresponsive per se. In any case, argues Uffner, "[i]n issues of responsiveness, only the Invitation for Bid and the . . . offer of the proposed contractor may be examined."

We agree that a bidder's failure to acknowledge receipt of a material amendment renders the bid nonresponsive and thus unacceptable since, absent such an acknowledgement, the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. See Four Seasons Maintenance, Inc., B-213459, Mar. 12, 1984, 84-1 C.P.D. ¶ 284.

However, the Federal Acquisition Regulation, § 14.405, 48 Fed. Reg. 42,102, 42,180 (1983) (to be codified at 48 C.F.R. § 14.405), provides that the contracting officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity or waive the deficiency and defines such an informality or irregularity as including the failure to acknowledge receipt of an amendment which "involves only a matter of form or has either no effect or merely a negligible effect on price, quantity, quality, or delivery of the item bid upon."

We have held in this regard that an amendment which merely clarifies an existing solicitation requirement is not material and, accordingly, a bidder's failure to acknowledge such an amendment is waivable as a minor informality. See Four Seasons Maintenance, Inc., B-213459, supra, 84-1 C.P.D. ¶ 284 at 2; AMS Manufacturing Inc., B-205492, Apr. 15, 1982, 82-1 C.P.D. ¶ 346. In such a case, the contractor is already obligated to meet the requirement even without the amendment and the government obviously suffers no prejudice from accepting the bid.

Moreover, in ascertaining which requirements a contractor already is obligated to meet, an agency is not limited to only those requirements set forth in the solicitation package itself. As we have previously indicated, incorporation of substantive terms and conditions into a contract by reference to other documents is a

B-215991

recognized method of contract drafting and the parties are legally bound to those terms so incorporated. Signal, Inc., B-202676, Sept. 10, 1981, 81-2 C.P.D. ¶ 209 (failure to acknowledge amendment which merely added provisions already incorporated by reference waivable as a minor informality).

Uffner has not shown that DLA lacked a reasonable basis for concluding that amendment No. 1 merely clarified a requirement already imposed by the solicitation. Accordingly, we do not believe that DLA acted improperly in refusing to reject Hialeah's bid as nonresponsive for failure to acknowledge the amendment.

The protest is denied.

for Melton J. Fowler
Comptroller General
of the United States